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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Office of Administrative Appeals MS 2090
Washington, DC 20529-2090

U.S. Citizenship and Immigration Services

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FILE: [redacted] Office: NEBRASKA SERVICE CENTER Date: JAN 0 8 2010

LIN 07 264 51611

IN RE: Petitioner: [redacted]
Beneficiary:

PETITION: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

ON BEHALF OF PETITIONER:

SELF-REPRESENTED

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

If you believe the law was inappropriately applied or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. Please refer to 8 C.F.R. § 103.5 for the specific requirements. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of $585. Any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen, as required by 8 C.F.R. § 103.5(a)(1)(i).

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The Director, Nebraska Service Center, denied the employment-based immigrant visa petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The AAO will dismiss the appeal.

The petitioner seeks classification pursuant to section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2), as a member of the professions holding an advanced degree. The petitioner seeks employment as a postdoctoral fellow at the University of California, Irvine (UCI). The petitioner asserts that an exemption from the requirement of a job offer, and thus of a labor certification, is in the national interest of the United States. The director found that the petitioner qualifies for classification as a member of the professions holding an advanced degree, but that the petitioner has not established that an exemption from the requirement of a job offer would be in the national interest of the United States.

On appeal, the petitioner submits a statement and evidence relating to his most recent work.

Section 203(b) of the Act states, in pertinent part:

> (2) Aliens Who Are Members of the Professions Holding Advanced Degrees or Aliens of Exceptional Ability. --
>
> > (A) In General. -- Visas shall be made available . . . to qualified immigrants who are members of the professions holding advanced degrees or their equivalent or who because of their exceptional ability in the sciences, arts, or business, will substantially benefit prospectively the national economy, cultural or educational interests, or welfare of the United States, and whose services in the sciences, arts, professions, or business are sought by an employer in the United States.
> >
> > (B) Waiver of Job Offer –
> >
> > > (i) . . . the Attorney General may, when the Attorney General deems it to be in the national interest, waive the requirements of subparagraph (A) that an alien's services in the sciences, arts, professions, or business be sought by an employer in the United States.

The director did not dispute that the petitioner qualifies as a member of the professions holding an advanced degree. The sole issue in contention is whether the petitioner has established that a waiver of the job offer requirement, and thus a labor certification, is in the national interest.

Neither the statute nor the pertinent regulations define the term "national interest." Additionally, Congress did not provide a specific definition of "in the national interest." The Committee on the Judiciary merely noted in its report to the Senate that the committee had "focused on national interest by increasing the number and proportion of visas for immigrants who would benefit the United States economically and otherwise. . . ." S. Rep. No. 55, 101st Cong., 1st Sess., 11 (1989).

Supplementary information to regulations implementing the Immigration Act of 1990 (IMMACT), published at 56 Fed. Reg. 60897, 60900 (November 29, 1991), states:

> The Service [now U.S. Citizenship and Immigration Services] believes it appropriate to leave the application of this test as flexible as possible, although clearly an alien seeking to meet the [national interest] standard must make a showing significantly above that necessary to prove the "prospective national benefit" [required of aliens seeking to qualify as "exceptional."] The burden will rest with the alien to establish that exemption from, or waiver of, the job offer will be in the national interest. Each case is to be judged on its own merits.

Matter of New York State Dept. of Transportation, 22 I&N Dec. 215 (Commr. 1998), has set forth several factors which must be considered when evaluating a request for a national interest waiver. First, it must be shown that the alien seeks employment in an area of substantial intrinsic merit. Next, it must be shown that the proposed benefit will be national in scope. Finally, the petitioner seeking the waiver must establish that the alien will serve the national interest to a substantially greater degree than would an available U.S. worker having the same minimum qualifications.

It must be noted that, while the national interest waiver hinges on prospective national benefit, it clearly must be established that the alien's past record justifies projections of future benefit to the national interest. The petitioner's subjective assurance that the alien will, in the future, serve the national interest cannot suffice to establish prospective national benefit. The inclusion of the term "prospective" is used here to require future contributions by the alien, rather than to facilitate the entry of an alien with no demonstrable prior achievements, and whose benefit to the national interest would thus be entirely speculative.

We also note that the regulation at 8 C.F.R. § 204.5(k)(2) defines "exceptional ability" as "a degree of expertise significantly above that ordinarily encountered" in a given area of endeavor. By statute, aliens of exceptional ability are generally subject to the job offer/labor certification requirement; they are not exempt by virtue of their exceptional ability. Therefore, whether a given alien seeks classification as an alien of exceptional ability, or as a member of the professions holding an advanced degree, that alien cannot qualify for a waiver just by demonstrating a degree of expertise significantly above that ordinarily encountered in his or her field of expertise.

The petitioner filed the petition on July 27, 2007. In an introductory statement, the petitioner (referring to himself by name, in the third person) described his work at the University of Texas, El Paso (UTEP):

> [The petitioner] chose the most challenging yet important research project, DNA repair mechanism, in the graduate program of the Department of Biology at UTEP. As all biologists know, the ultimate cause of cancer is DNA damage. . . . [The petitioner] studied AP endonuclease from Chinese hamster with 92% similarity to the human counterpart. He expressed the protein in insect cell line, mastered molecular biology techniques and enzyme kinetic analysis knowledge, and characterized the enzyme.

The expression of AP endonuclease was quite a novel work at that time.

Regarding his later work at UCI, the petitioner stated:

> [The petitioner] solved a very important crystal structure of CooA protein in the form of active CO bound complex. The finding, published in the prestigious journal – *Acta crystallographica*, has a tremendous impact on the understanding of the huge conformational change of this gas sensing transcription factor upon the binding of the signaling gas molecule. CooA is a member of the large transcription factor family (cAMP receptor protein or CRP) in the bacterial world. The mechanism described in [the petitioner's] paper provided the structural insight into the activation of pathogenic *Escherichia coli* cAMP receptor protein. . . .
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> [The petitioner's] other projects are studies of human Soluble Guanylate Cyclase (sGC) and DosT from *Mycobacterium tuberculosis*. sGC is a heme enzyme that converts GTP to cGMP upon binding NO gas inside the cells. cGMP, much like cAMP, acts as a universal second messenger in the cells. One of the major functions of cGMP in human body is promoting the relaxation of vascular smooth muscles, which leads to vasodilation and increased blood flow. . . .
>
> DosT is an important oxygen sensing heme protein of *Mycobacterium tuberculosis* (TB bacterium) that plays a major role in bacterial two component signal transduction pathway. Blocking this signal transduction is surely a deadly blow to this bug.

The petitioner submitted several letters, all from the petitioner's professors and collaborators. [redacted] [redacted] stated:

> [The petitioner] independently developed his own research ideas and began an active collaboration with professors in the Chemistry Department. He used high-tech analytical instrumen[ta]tion, such as the ICP spectrometer, to incorporate 3D structural information into his metal titration analysis of AP endonuclease. This was a methodologically difficult endeavor, and the capacity for collaboration and interdisciplinary learning that he demonstrated was remarkable – to a degree that I've seldom seen in a faculty member, much less a foreign graduate student. . . . Not surprisingly, upon being granted the PhD degree, he was recruited to a renowned X ray crystallography laboratory at the University of California-Irvine for further postdoctoral training in structural biology, in order to study important bio-molecules at the atomic level of resolution. This further training, which is currently in progress, will help fill out [the petitioner's] potential for a highly successful career in the important biomedical research field.

[redacted] of UTEP's Graduate School, ranked the petitioner "among the top two or three graduate students that have worked with me." [redacted] stated that the petitioner "has the

potential to become an outstanding research scientist and to make significant contributions to the fields of DNA repair, cancer biology and protein biochemistry."

[redacted], now an assistant research professor at the Burnham Institute for Medical Research, previously collaborated with the petitioner and served on his thesis committee at UTEP. He credited the petitioner with "very important seminal contributions that lead toward innovative drug design."

[redacted] stated that the petitioner "was an excellent student with extraordinary intellectual aspirations," who "always took the most challenging projects and conducted the experiments in an almost perfectionist way." [redacted] stated that the petitioner "was the first person who successfully expressed APE in insect cells."

[redacted] stated:

> [The petitioner] has rapidly risen to [a] position of major responsibility since joining [my] lab as a postdoc in Feb. 2005. He currently is in charge of a critical NIH funded research project. He arrived in the lab as an outstanding protein chemist and molecular biologist with essentially no training or background in protein crystallography. In a remarkably short period of time he has mastered all aspects of determining x-ray crystal structures and published a paper (as first author) in a prestigious crystallographic journal. This paper puts forth a hypothesis on how an important carbon monoxide sensing transcription factor works. This has been a puzzle for some time but [the petitioner's] work has provided the critical structural underpinnings for understanding how this large group of transcription factors work[s]. . . .
>
> Because of his unusual ability to master new techniques quickly, his keen intellect, work ethic, and ambition to accomplish something important, he has taken on some of the most difficult yet important projects in the lab.

[redacted], who has "collaborated with the Poulos lab since 1999," stated:

> [The petitioner] has been a major driving force in the scientific community's understanding of CooA. CooA exists in two forms: in the absence of carbon monoxide (CO), CooA is inactive, but in the presence of CO, CooA binds CO tightly and undergoes a huge conformational change that allows it to turn on genes. The products of these genes then degrade the CO. When [the petitioner] started the project, we only knew the inactive structure of CooA. We therefore neither knew the more biologically important active form nor did we understand the effect caused by CO binding. [The petitioner's] structure of the active form of CooA has changed our understanding completely.

[redacted] stated that the petitioner "elegantly designed an experiment to trap CO in protein crystals and solved the CO complexed CooA structure. This experiment provides insight into the activation mechanism of CRP by cAMP, and is the first CO complex CooA structure that directly demonstrates the structural similarities with the active form of CRP-cAMP complex."

[redacted] of the Federal University of Santa Catarina, Brazil, who has collaborated with [redacted] was "impressed by [the petitioner's] clever design of the experiments using chemistry tools," calling the petitioner's methods "exceptionally innovative" and "intriguing."

[redacted] of UCI's Department of Molecular Biology and Biochemistry, called the petitioner "a unique and talented young scientist and the best postdoc with immeasurable potential in our department." [redacted] stated that the petitioner "published a major X ray crystal structure paper of an important carbon monoxide (CO) sensing transcription factor called "COOA" in a prestigious journal."

The petitioner submitted copies of one published article, but no evidence (such as citations) to show how the scientific community received the article. The petitioner also submitted three manuscripts, with no evidence of publication.

On September 10, 2008, the director issued a request for evidence, instructing the petitioner to submit documentation of his impact on his field, such as citations of his published work. In response, the petitioner acknowledged that he was not submitting "the requested items." He asked the director, however, to take into consideration that his "research fields and interests are going more deliberately oriented and more challenging. . . . X ray crystallography is the ultimate accurate and technically demanding technology in life sciences." This assertion attests to the intrinsic merit of X-ray crystallography, but Congress established no blanket waiver for X-ray crystallographers. The petitioner must establish not only the importance of his field, but also that of his work in the field.

The petitioner stated: "Since last fall [*i.e.*, fall 2007], I have been interested in DNA sequencing technology." The petitioner did not cite any achievements in this area; he merely expressed an interest in pursuing it. Even then, he acknowledged that he was not doing this work when he filed the petition in summer 2007. An applicant or petitioner must establish that he or she is eligible for the requested benefit at the time of filing the application or petition. 8 C.F.R. §§ 103.2(b)(1), (12). Therefore, subsequent events cannot cause a previously ineligible alien to become eligible after the filing date. *See Matter of Katigbak*, 14 I&N Dec. 45, 49 (Regl. Commr. 1971).

The petitioner conceded that his publication and citation record did not support approval of the petition, but he asked the director to take into account that the petitioner is "a versatile scientist" who is "on two rails – publication and invention. I always believe I will achieve more important things as long as I . . . keep seeking and doing [a] good job." The petitioner's versatility and persistence are, without a doubt, desirable qualities in a researcher. These personal traits, however, cannot form a sufficient foundation for the special immigration benefit of a national interest waiver.

The director denied the petition on February 23, 2009, stating that the petitioner has not shown that his "modest publication record" has had significant impact in his field. The director noted the petitioner's submission of favorable witness letters, but found that the record lacks objective evidence of the significance of the petitioner's work.

On appeal, again referring to himself in the third person, the petitioner states:

> The petitioner now realized that his response to the Request for Evidence was inadequate due to lack of citations and too much effort contributed on idea development of whole genome sequencing technology and microRNA profiling technique. Since the idea of microRNA profiling is mature and the [grant] proposal is being written . . . , the petitioner would like to provide a new line of evidence to support his Immigration Visa Petition.
>
> . . . Briefly, microRNA, associated with many types of cancer and other serious diseases, is a potential diagnostic and therapeutic agent. Profiling microRNA in [a] clinical lab is the doorstep to the personalized medicine. . . . Since the idea is innovative and accomplishable, we are very optimistic about the funding.

The petitioner submits materials relating to the proposed project described above. This project was not even proposed until well after the petition's filing date. As we have already noted (and as the director noted in the decision), the petitioner must be eligible for the benefit sought when he files the petition. Later developments cannot retroactively cause him to have been eligible on the filing date. For this reason, a petitioner may not make material changes to a petition that has already been filed in an effort to make an apparently deficient petition conform to USCIS requirements. *See Matter of Izummi*, 22 I&N Dec. 169, 175 (Commr. 1998). This applies, as well, to the handful of new citations that the petitioner documents on appeal.

The petitioner, on appeal, asserts that his innovative and original ideas can help him to make significant contributions in the future. Nevertheless, those traits are difficult to quantify as evidence. Intriguing research ideas and the petitioner's self-confidence cannot guarantee that the petitioner will bring those ideas to fruition, or that the petitioner's research will yield the expected results. Viewed in this light, the petition appears to have been, at best, prematurely filed, before the petitioner had the opportunity fully to prove that his accomplishments will match his own high expectations.

Without a doubt, the petitioner has risen from what he describes as humble origins and earned the respect of his mentors. The letters show that he has made a deep and favorable impression on his professors and collaborators, but they cannot, by themselves, establish the petitioner's wider impact on his field. Witnesses have praised the petitioner's potential for significant achievements, but subjective opinions about the petitioner's potential cannot replace persuasive evidence that the petitioner has already realized that potential. Some witnesses have praised the petitioner's work with CooA, but the record does not show that independent researchers share the witnesses' opinions about that work.

As is clear from a plain reading of the statute, it was not the intent of Congress that every person qualified to engage in a profession in the United States should be exempt from the requirement of a job offer based on national interest. Likewise, it does not appear to have been the intent of Congress to grant national interest waivers on the basis of the overall importance of a given profession, rather than on the merits of the individual alien. On the basis of the evidence submitted, the petitioner has not established that a waiver of the requirement of an approved labor certification will be in the national interest of the United States.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not sustained that burden.

This decision is without prejudice to the filing of a new petition by a United States employer accompanied by a labor certification issued by the Department of Labor, appropriate supporting evidence and fee.

ORDER: The appeal is dismissed.